IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

PETN,UNDER ARBITRATION ACT. No 47 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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EVERST RAILWAY CONSTRUCTION [PVT.] LTD.

Versus

UNION OF INDIA

Appearance:

1. PETN,UNDER ARBITRATION ACT. No. 47 of 2001
   MR DK NAKRANI for Petitioner No. 1
   MR UM SHASTRI for Respondent No. 1
   MR MG NAGARKAR for Respondent No. 1
2. PETN,UNDER ARBITRATION ACT. No. 48 of 2001
   MR DK NAKRANI for Petitioner No. 1
   MR UM SHASTRI for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 05/07/2002

ORAL JUDGEMENT

Heard learned counsel for petitioner Mr. Nakrani and Mr. MG Nagarkar for the respondent.

This petition is moved under sec. 11 of the Arbitration and Conciliation Act, 1996 praying that the Arbitrator of the choice of this court be appointed to resolve the disputes and differences between the parties referred to by the petitioner mainly in para-5 of the petition and the statutory notice served to the otherside Annexure-A to this petition.

Learned counsel for the parties have agreed that the point of jurisdiction involved in this matter be heard first and if it is decided in favour of the petitioner, than the rest of the points can be heard on merits.

As per the settled legal proposition when the issue of jurisdiction and/or maintenability of a proceeding has been raised by the otherside, it can be heard as preliminary issue/point.

Having considered the rival contentions of the learned counsel for the parties and it is submitted that the dispute and differences referred to by the petitioner in the legal notice served to the otherside is already under reference before the City Civil Court, Ahmedabad. Para-7 of this petition runs as under:

"The petitioner further respectfully submits that due to this disputes and differences, the petitioner has already issued legal notice under clause of the Condition of the Contract Agreement on 16.9.1991. A copy of the notice dated 16.9.1991 is annexed herewith and marked as Annexure-A. Inspuite of this notice neither the respondent has appointed the arbitrator nor they have paid the said amount. The petitioner further submits that there is an Arbitration clause number 3 of contract agreement. A copy of arbitration clause 3 of the contract agreement is annexed herewith and marked as Annexure-B."

In para-9 of the petition, the petitioner has fairly submitted that because of non-payment of legitimate dues claimed under final bill, the petitioner was constrained to approach the City Civil Court

Ahmedabad by way of filing Civil Suit No. 2304 of 1992 for the appointment of Arbitrator under sec. 20 of the Arbitration Act, 1940 (i.e. Old Act).

Mr MG Nagarkar by placing reliance on the decision of the Apex Court reported in 1998(2) Arb.LR p. 314 in the case of Shetty's Constructions Co. Pvt. Ltd. vs. Konkan Railway Construction and another, has submitted that this fresh proceeding under new act would not be maintainable. In the cited decision the Apex Court after referring sec. 21 and 85(2)(a) of New Act i.e. 1996 Act has held that "demand for referring disputes if made prior to coming into force new act of 1996, the suit would govern by the old Act. Factual matrix and the ratio is reflected in para-4 of the judgment, the court observed that:-

"A mere look to sub-section(2)(a) of Section 85 shows that dispite the repeal of Arbitration Act, 1940, the provisions of the said enactment shall be applicable in relation to arbitration proceedings which have commenced prior to the coming into force of the new Act. The new Act came into force on 26.1.1996. The question therefore, arises whether on that date the arbitration proceedings in the present four suits had commenced or nor. For resolving this controversy we may turn to section 21 of the new Act which lays down that unless otherwise agreed to between the parties, the arbitration suit in respect of arbitration dispute commenced on the date on which the request for referring the dispute for arbitration is received by the respondents. Therefore, it must be foundout whether the requests by the petitioner for referring the disputes for arbitration were moved for consideration of the respondents on and after 26.1.1996 or prior thereto. If such requests were made prior to that date, then on a conjoint reading of Section 21 and Section 85(2)(a) of the new Act, it must be held that these proceedings will be governed by the old Act."

The date referred in the above mentioned para-7, obviously is of month September, 1991 i.e. prior to the commencement of the new Act. The observations of the Apex Court in para-5 of the decision is clear and would squarely applicable to the facts of this case.

The other decision of the Apex Court in the case

of Thyssen Stahlunion GMBH vs. Steel Authority of India reported in (1999) 9 SCC p. 334, where the Court has observed that so far as the applicability of the saving clause under sec. 85(2)(a) is concerned, the words "arbital proceedings" which commenced before are important. Thus, what is saved is applicability of all provisions of the old Act where the arbital proceedings have commenced before the cut-of date. Issuance of statutory notice and filing of civil suit praying relief in reference to sec. 20 of the 1940 Act can be said to be a commencement of proceedings. So,the finding recorded by the Apex court in para-22(1) of this cited judgment also would be relevant and the present proceedings initiated under sec. 11 of the Act cannot sustain.

The petitioner can very well continue with the with the proceedings pending under sec. 20 of the 1940 Act before the City Civil Court, Ahmedabad. This petition under sec. 11 is not maintanable as the new Act would not apply to the proceedings.

So, this petition stands dismissed accordingly as this court has no jurisdiction to appoint Arbitrator under sec. 11 of the Act.

(C.K. BUCH, J.)
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